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Vacating Awards Under the Wisconsin Arbitration Act and the Federal Arbitration Act

Ralph Anzivino

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VACATING AWARDS UNDER THE WISCONSIN ARBITRATION ACT AND THE FEDERAL ARBITRATION ACT

RALPH ANZIVINO*

Arbitration has become one of the primary means for parties to resolve their legal disputes. Unlike a court proceeding, however, the grounds for vacating an arbitration award are quite narrow and specific. The purpose of this Article is to identify and explain the five major ways to vacate an arbitration award under the Federal Arbitration Act and the Wisconsin Arbitration Act. The first way is to challenge whether the parties contractually agreed to arbitrate the dispute. The specific challenge is to the scope of the contract or the scope of the arbitration clause in the contract. The second is to show that the other party was involved in some type of conduct involving corruption, fraud, or undue means that impacted the arbitration award. The third is to prove that the arbitrator was evidently partial and, thus, a fair and impartial arbitrator did not decide the award. The fourth is to establish that the arbitrator committed some type of administrative misconduct in conducting the arbitration. Finally, the fifth is to prove that the arbitrator misused his power and, thereby, exceeded his authority. Each of the grounds is analyzed in detail, with case examples to enhance one's understanding.

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* Professor of Law, Marquette University Law School.

I. INTRODUCTION

Arbitration has become one of the mainstays for resolving legal disputes. Virtually every type of dispute and every area of the law lends itself to resolution by arbitration. In addition, it is not necessary that an attorney be a litigator in order to competently participate in arbitration. There are no rules of evidence, there are no juries, discovery is often very limited, the hearing is private, and attorneys are generally given a very wide berth in presenting their case to the arbitrator. As a result, most attorneys, including ones who consider themselves to be transactional lawyers, will be involved in some type of arbitration.

The primary arbitration statute under federal law is the Federal Arbitration Act (FAA),¹ and in Wisconsin it is the Wisconsin Arbitration Act (WAA).² The statutes are virtually identical, so cases decided under one statute are persuasive authority for the other in the absence of a conflicting precedent.³ The FAA or the WAA will govern virtually every arbitration conducted in Wisconsin, unless the parties' contract states otherwise.⁴ For example, any contract that provides "Wisconsin law shall control" or similar language will be arbitrated under the WAA.⁵

Unfortunately, there may be occasions when the attorney and client believe the arbitrator's award should be vacated. Unlike an appeal of a court decision, where the appellate courts are free to view the application of the law to the facts in a different way than the lower court, the review of an arbitrator's award by a reviewing court is significantly different. The purpose of this Article is to identify and explain the various ways that an attorney can seek to have an arbitrator's award vacated before it is confirmed by a court. A subsequent article will address the issue of seeking relief from the arbitrator's award once it has become a judgment by court confirmation.

There are five primary ways to get an arbitrator's award vacated. The first is to challenge whether the parties ever agreed to arbitrate a matter. This typically involves either challenging the existence or validity of a contract to arbitrate, or the scope of the arbitration clause,

1. 9 U.S.C. §§ 1–16 (2012).

2. *See* WIS. STAT. §§ 788.01–18 (2013–2014).

3. *Marlowe v. IDS Prop. Cas. Ins. Co.*, 2012 WI App 51, ¶ 9, 340 Wis. 2d 594, 811 N.W.2d 894; *Steichen v. Hensler*, 2005 WI App 117, ¶ 14, 283 Wis. 2d 755, 701 N.W.2d 1.

4. *See* 9 U.S.C. § 2; WIS. STAT. § 788.01.

5. WIS. STAT. § 788.01.

if there is a contract between the parties. This is called substantive arbitrability. The second is to show that the other party was involved in some type of conduct involving corruption, fraud, or undue means that impacted the arbitration award. The third is to prove that the arbitrator was evidently partial and, thus, a fair and impartial arbitrator did not decide the award. The fourth is to establish that the arbitrator committed some type of administrative misconduct in conducting the arbitration. Examples would be failing to admit evidence or denying an adjournment request. Finally, the last ground is to prove that the arbitrator misused his power and thereby exceeded his authority. An arbitrator misuses his power by perversely misconstruing his authority, manifestly disregarding the law, or issuing an award that is against public policy.

II. GENERAL PRINCIPLES

As a basic proposition, Wisconsin courts take “a ‘hands off’ approach to arbitration awards.”⁶ The primary function of a reviewing court is to assure the parties that they received the arbitration they agreed to in their contract.⁷ The general rule followed by the courts is not to overturn an arbitrator’s award even if there has been serious error.⁸ It is not a sufficient ground to vacate an award simply because the arbitrator’s decision is wrong or based on an error of law or fact.⁹ Rather, there must be extraordinary circumstances to vacate an award.¹⁰ In addition, any ground to vacate an award must be proven by clear and convincing evidence.¹¹ Finally, absent fraud, a party unhappy with an arbitration award cannot seek discovery from an arbitrator to secure

6. *Grambow v. Associated Dental Servs., Inc.*, No. 94-1735, 1996 WL 5638, at *2, 199 Wis. 2d 522, 546 N.W.2d 578 (Ct. App. Jan. 9, 1996) (per curiam, unpublished table decision) (quoting *City of Madison v. Madison Prof’l Police Officers Ass’n*, 144 Wis. 2d 576, 587, 425 N.W.2d 8, 12 (1988)) (internal quotation mark omitted).

7. *Milwaukee Metro. Sewerage Dist. v. Dist. Council 48*, No. 85-0821, 1985 Wisc. App. LEXIS 3957, at *4, 128 Wis. 2d 556, 381 N.W.2d 621 (Dec. 4, 1985) (unpublished table decision).

8. *Greendale Educ. Ass’n v. Greendale Sch. Dist.*, No. 01-3234, 2002 WL 31455693, ¶ 8, 2003 WI App 1, 259 Wis. 2d 481, 655 N.W.2d 546 (Nov. 5, 2002) (per curiam, unpublished table decision).

9. *Id.* ¶ 12.

10. *Id.* ¶ 9.

11. *DeBaker v. Shah*, 194 Wis. 2d 104, 117, 533 N.W.2d 464, 468 (1995).

evidence in the hope of vacating the arbitrator's award.¹² As a further indication of limited judicial review of arbitration awards, Wisconsin has adopted the *Steelworkers Trilogy* when addressing labor contract disputes.¹³

Courts "will not relitigate issues submitted to arbitration."¹⁴ When reviewing an arbitrator's award, a court is not entitled to consider new evidence on the merits of the award.¹⁵ Further, even newly discovered evidence is not a sufficient ground to re-litigate the dispute.¹⁶

Courts have concluded that "arbitration is not litigation."¹⁷ However, when reviewing an arbitrator's award, the doctrines of res judicata¹⁸ and collateral estoppel¹⁹ have been applied to arbitrations.²⁰ One court noted that a prior fact-finding arbitration is res judicata on a subsequent arbitration between the same parties.²¹ Those doctrines, however, will not be considered if the arbitrator's award goes beyond the submission of the contract.²² Similarly, the doctrines of claim²³ and

12. *Farmers Auto. Ins. Ass'n v. Union Pac. Ry. Co.*, 2008 WI App 116, ¶ 19, 313 Wis. 2d 93, 756 N.W.2d 461.

13. *Denhart v. Waukesha Brewing Co.*, 17 Wis. 2d 44, 51–52, 115 N.W.2d 490, 494 (1962); *see also* *City of Madison v. AFSCME*, 124 Wis. 2d 298, 302, 369 N.W.2d 759, 762 (Ct. App. 1985).

14. *McLaughlin v. Hoffman*, No. 2009AP624, 2010 WL 347908, ¶ 8, 2010 WI App 46, 324 Wis. 2d 306, 784 N.W.2d 183 (Feb. 2, 2010) (per curiam, unpublished table decision).

15. *Barnard v. Heritage Mut. Ins. Co.*, No. 88-0600, 1988 WL 148354, at *3, 148 Wis. 2d 948, 437 N.W.2d 235 (Ct. App. Dec. 20, 1988) (per curiam, unpublished table decision).

16. *Id.*

17. *Badger Contracting, Inc. v. Harwood*, No. 99-0824, 2000 WL 486262, ¶ 7, 2000 WI App 116, 235 Wis. 2d 275, 616 N.W.2d 524 (Apr. 26, 2000) (unpublished table decision).

18.

An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit. . . .

The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.

BLACK'S LAW DICTIONARY 1504 (10th ed. 2014) [hereinafter BLACK'S] (res judicata).

19. "A doctrine barring a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one." *Id.* at 318 (collateral estoppel).

20. *Manu-Tronics, Inc. v. Effective Mgmt. Sys., Inc.*, 163 Wis. 2d 304, 311, 471 N.W.2d 263, 266 (Ct. App. 1991).

21. *Local 366 v. Milwaukee Metro. Sewerage Dist.*, No. 82-1739, 1983 WL 161544, at *2, 114 Wis. 2d 595, 338 N.W.2d 527 (Ct. App. July 11, 1983) (unpublished table decision).

22. *Id.* at *3.

issue preclusion²⁴ are applicable to successive arbitration decisions, the same as successive litigation, because the policies underlying arbitration—of a speedy, final decision—support the application of these doctrines.²⁵ Finally, the doctrine of judicial estoppel²⁶ has also been applied in an arbitration setting. Where a party to arbitration claimed that an arbitration clause was unconscionable, the court applied the doctrine of judicial estoppel because it was that party who invoked the arbitration clause in the first place.²⁷

III. SUBSTANTIVE ARBITRABILITY

Substantive arbitrability is the first issue considered by the courts when deciding whether to vacate an arbitrator's award.²⁸ There are two issues that comprise substantive arbitrability. The first issue is whether the parties have consented to arbitration through a written agreement.²⁹ Interestingly, the statute does not provide for enforcement of an oral agreement to arbitrate but rather only a written one.³⁰ The second issue

23. The rule of claim preclusion is that any claims that were brought or could have been brought in an earlier litigation between the parties must be brought in the first action or be barred. 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4406, at 138 (2d ed. 2002).

24. The rule of issue preclusion is that “a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies.” *Id.* § 4416, at 387 (quoting *S. Pac. R.R. Co. v. United States*, 168 U.S. 1, 48 (1897)).

25. *Dane Cnty. v. Dane Cnty. Union Local 65*, 210 Wis. 2d 267, 279, 565 N.W.2d 540, 545 (Ct. App. 1997). The minimum requirements for application of the preclusion doctrines are that “the claim, or the issue . . . decided in the first arbitration is the same” issue or claim in the second arbitration, “the parties are the same, the parties have had a full opportunity to argue their respective positions,” and “the parties have not agreed to re-submit the claim or the issue . . . to a second arbitration.” *Id.* at 280.

26. “Estoppel that prevents a party from contradicting previous declarations made during the same or an earlier proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court.” BLACK’S, *supra* note 18, at 668 (judicial estoppel).

27. *Pegues v. Progressive N. Ins. Co.*, No. 2008AP1500, 2009 WL 454672, ¶ 18, 2009 WI App 41, 316 Wis. 2d 774, 766 N.W.2d 242 (Feb. 25, 2009) (per curiam, unpublished table decision).

28. *Tri-Cnty. Invs., LLC v. Toney Law Offices, S.C.*, No. 2007AP195, 2008 WL 426233, ¶ 12, 2008 WI App 51, 309 Wis. 2d 234, 747 N.W.2d 527 (Feb. 19, 2008) (per curiam, unpublished table decision).

29. *Boardman, Suhr, Curry & Field, LLP v. Bosben*, No. 2011AP1862, 2013 WL 627247, ¶ 7, 2013 WI App 41, 346 Wis. 2d 730, 828 N.W.2d 592 (Feb. 21, 2013) (per curiam, unpublished table decision).

30. *See* WIS. STAT. §§ 788.02–.03 (2013–2014).

is, if they have such an agreement, whether the subject matter of the dispute falls within the scope of the arbitration agreement or clause.³¹ The test utilized by the courts in making such a determination is whether the court can “determine with reasonable certainty that there was a ‘common intent’ to submit that particular issue to arbitration.”³² Essentially, the court must determine whether the arbitrator’s analysis came from the essence of the contract.³³

The parties in their written agreement can refer issues of arbitrability to the arbitrator, but the courts require a “clear demonstration of that purpose.”³⁴ As a general rule, the courts indicate that an arbitrator should not “be the judge of the scope of his . . . authority . . . unless” the parties’ contract “clearly and unmistakably grant[s] the arbitrator such authority.”³⁵ In the event that the arbitrability issue is submitted to the arbitrator, the court will not overturn the arbitrator’s decision on arbitrability unless it can be said with “positive assurance” that the language defining the arbitral issue is not susceptible to the arbitrator’s interpretation.³⁶ Further, the courts will “resolve any doubts in favor of coverage.”³⁷ In other words, if the parties’ written contract does not expressly provide that the arbitrator can decide issues of arbitrability, any arbitrator decision on arbitrability is subject to judicial de novo review without any deference to the

31. *Id.*; Superior Cranberry Creek Landfill Negotiating Comm. v. State Waste Facility Siting Bd., No. 2003AP3167, 2005 WL 1981272, ¶ 7, 2005 WI App 214, 287 Wis. 2d 506, 704 N.W.2d 423 (Aug. 18, 2005) (per curiam, unpublished table decision).

32. Milwaukee Dist. Council 48 v. City of Milwaukee, No. 99-2069, 2000 WL 705353, ¶ 9, 200 WI App 161, 238 Wis. 2d 94, 617 N.W.2d 677 (June 1, 2000) (unpublished table decision) (quoting Emp’rs Ins. of Wausau v. Certain Underwriters at Lloyd’s London, 202 Wis. 2d 673, 681, 552 N.W.2d 420, 423 (Ct. App. 1996)).

33. *Id.* ¶ 9.

34. Joint Sch. Dist. No. 10 v. Jefferson Educ. Ass’n, 78 Wis. 2d 94, 102, 253 N.W.2d 536, 540–41 (1977) (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 n.7 (1960)); Milwaukee Dist. Council 48 v. Milwaukee Cnty., 2011 WI App 14, ¶ 11, 331 Wis. 2d 188, 795 N.W.2d 777.

35. Hudec Law Offices, S.C. v. Esser, 2003 WL 22998535, ¶ 8, 2004 WI App 21, 269 Wis. 2d 543, 674 N.W.2d 681 (Dec. 23, 2003) (per curiam, unpublished table decision) (citing AT&T Techs., Inc. v. Commc’ns Workers of Am., 475 U.S. 643, 649 (1986)).

36. Cirilli v. Country Ins. & Fin. Servs., 2009 WI App 167, ¶ 14, 322 Wis. 2d 238, 776 N.W.2d 272 (quoting *AT&T Techs.*, 475 U.S. at 650); *Superior Cranberry*, 2005 WL 1981272, ¶ 7 (quoting *Madison Landfills, Inc. v. Libby Landfill Negotiating Comm.*, 188 Wis. 2d 613, 634, 524 N.W.2d 883, 892 (1994)).

37. *Superior Cranberry*, 2005 WL 1981272, ¶ 7 (quoting *Madison Landfills, Inc.*, 188 Wis. 2d at 634).

arbitrator's decision.³⁸ On the other hand, if the parties' written agreement does provide that the arbitrator can decide issues of arbitrability, then the arbitrator's decision will be granted the normal deference.³⁹

There is no procedure defined in the statutes or prescribed by the courts for raising the issue of substantive arbitrability.⁴⁰ As a practical matter, the issue will be raised depending upon whether a party has initiated court litigation. If litigation has already been initiated, upon application of one of the parties, the court shall stay the trial of the action until arbitration has been had in accordance with the terms of the agreement.⁴¹ Before referring the matter to arbitration, the court must be satisfied that the issue involved in the suit or proceeding is properly referred to arbitration under the parties' agreement.⁴² Therefore, prior to referral, the court will necessarily decide substantive arbitrability.

In the event that litigation in court has not been initiated between the parties, the party opposing arbitration has several choices available on how to raise the issue of substantive arbitrability. First, the party opposing arbitration can simply refuse to participate in the arbitration.⁴³ Second, the opposing party could seek an injunction against the arbitration.⁴⁴ And third, the party opposing arbitration could decide to submit to the arbitration while preserving the objection to substantive arbitrability for subsequent de novo judicial review.⁴⁵

The best choice is simply to refuse to participate in the arbitration. By refusing to participate in the arbitration process, the refusing party thereby forces the moving party to seek a court order to arbitrate.⁴⁶ The exclusive remedy for a party's refusal to arbitrate is to compel arbitration through a court order, and the failure to do so constitutes a waiver of substantive arbitrability should the moving party choose to

38. *Madison Teachers Inc. v. Madison Metro. Sch. Dist.*, 2004 WI App 54, ¶ 10, 271 Wis. 2d 697, 678 N.W.2d 311.

39. *Id.*

40. *Scholl v. Lundberg*, 178 Wis. 2d 259, 264, 504 N.W.2d 115, 117 (Ct. App. 1993).

41. 9 U.S.C. § 3 (2012); WIS. STAT. § 788.02 (2013–2014).

42. 9 U.S.C. § 3; WIS. STAT. § 788.02.

43. *Scholl*, 178 Wis. 2d at 264–65.

44. *Id.* at 264.

45. *Joint Sch. Dist. No. 10 v. Jefferson Educ. Ass'n*, 78 Wis. 2d 94, 106–07, 253 N.W.2d 536, 542–43 (1977).

46. 9 U.S.C. § 4; WIS. STAT. § 788.03.

proceed without complying with the statute.⁴⁷ As part of the process to compel arbitration, “[t]he court shall hear the parties, and upon being satisfied that” substantive arbitrability is not an issue “shall make an order directing the parties to proceed to arbitration.”⁴⁸ Seeking an injunction would place the burden of proof on the moving party and is also contrary to the exclusive remedy provided for a party’s refusal to arbitrate. Finally, the third choice is needlessly wasteful in that the court does not finally resolve the substantive arbitrability issue until the arbitration process is completed.

A cautionary note is that partial participation in the arbitration process without a reservation of rights can be deemed a waiver of the substantive arbitrability issue.⁴⁹ Courts have held that where one party participates in preliminary arbitration procedures in preparation for a hearing on the merits, that party is indicating to the other that it intends to fully participate in the process and thereby waives the substantive arbitrability issue.⁵⁰ Where a party raised the issue of substantive arbitrability three and one-half months after the petition was filed compelling arbitration, and after having participated in the arbitrator selection process, the court held the party was estopped from raising the substantive arbitrability issue.⁵¹

Also, a challenge to substantive arbitrability must be made to the arbitrator, or it will be waived.⁵² Where a party challenged an arbitrator’s award in court on the basis that the opposing party failed to produce a written contract whereby the parties agreed to arbitrate the dispute, but failed to raise that issue before the arbitrator, the court held the substantive arbitrability issue was waived.⁵³ Similarly, where a party sought attorney’s fees and prejudgment interest as part of an arbitration

47. State *ex rel.* Carl v. Charles, 71 Wis. 2d 85, 90, 237 N.W.2d 29, 31 (1976).

48. 9 U.S.C. § 4; WIS. STAT. § 788.03.

49. Pilgrim Inv. Corp. v. Reed, 156 Wis. 2d 677, 685, 457 N.W.2d 544, 548 (Ct. App. 1990).

50. *Id.* at 685–86.

51. *Id.* at 686–87.

52. MBNA Am. Bank v. Gilbertson, No. 2004AP1071, 2005 WL 1119749, ¶ 13, 2005 WI App 126, 284 Wis. 2d 569, 699 N.W.2d 252 (May 11, 2005) (per curiam, unpublished table decision) (citing DePue v. Mastermold, Inc., 161 Wis. 2d 697, 703–04, 468 N.W.2d 750, 752 (Ct. App. 1991)).

53. MBNA Am. Bank, 2005 WL 1119749, ¶ 13.

award, the court held that those issues were waived since they were not brought before the arbitrator who granted the award.⁵⁴

Finally, an arbitrator does not have “the power to consolidate claims [that arise] under separate arbitration contracts absent an agreement to do so, even if consolidation” would resolve the claims more efficiently.⁵⁵ An arbitrator, however, can order consolidation of claims through an implicit agreement if the way the parties framed the issues evidenced an agreement to consolidate the claims.⁵⁶

IV. CORRUPTION, FRAUD, OR UNDUE MEANS

A court will vacate an arbitrator’s award if it “was procured by corruption, fraud, or undue means.”⁵⁷ There are essentially three requirements that must be satisfied in order to have an award vacated on the basis of corruption, fraud, or undue means. First, the aggrieved party must establish the improper conduct.⁵⁸ Second, there must be a nexus between the improper conduct and the arbitrator’s award.⁵⁹ And third, the aggrieved party must prove that the improper conduct was not discoverable prior to the award.⁶⁰

The first requirement is to fit the alleged improper conduct into the appropriate statutory category. Corruption is not defined in the statute or case law. Fraud, on the other hand, is a well-traveled road and understood to be a “knowing misrepresentation or concealment of a material fact to induce another to act to his . . . detriment.”⁶¹ A simple example would be obtaining an arbitration award as a result of perjured

54. *Badger Contracting, Inc. v. Harwood*, No. 99-0824, 2000 WL 486262, ¶¶ 2, 8, 2000 WI App 116, 235 Wis. 2d 275, 616 N.W.2d 524 (Apr. 26, 2000) (unpublished table decision).

55. *Emp’rs Ins. of Wausau v. Certain Underwriters at Lloyd’s London*, 202 Wis. 2d 673, 683, 552 N.W.2d 420, 424 (Ct. App. 1996).

56. *Id.* at 684.

57. 9 U.S.C. § 10(a)(1) (2012); WIS. STAT. § 788.10(1)(a) (2013–2014).

58. *Pegues v. Progressive N. Ins. Co.*, No. 2008AP1500, 2009 WL 454672, ¶ 11, 2009 WI App 41, 316 Wis. 2d 774, 766 N.W.2d 242 (Feb. 25, 2009) (per curiam, unpublished table decision).

59. *Id.* ¶ 15.

60. *Pegues*, 2009 WL 454672, ¶¶ 15–16; *Steichen v. Hensler*, 2005 WI App 117, ¶¶ 14–15, 283 Wis. 2d 755, 701 N.W.2d 1; *Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104, 109 (N.D. Ill. 1980), *aff’d*, 653 F.2d 310 (7th Cir. 1981).

61. BLACK’S, *supra* note 18, at 775.

testimony.⁶² Conflicting affidavits by the same person, however, do not establish fraud but simply a conflict in testimony.⁶³

Undue means is understood to be “an attempt to influence the arbitrators through inappropriate, unjustified or improper methods.”⁶⁴ “[I]t clearly connotes behavior that is immoral if not illegal.”⁶⁵ “[M]ere sloppy or overzealous lawyering,” however, does not constitute “undue means.”⁶⁶ Since the term follows corruption and fraud, courts indicate that it “should be known by the company it keeps.”⁶⁷ As such, it is understood to mean “underhanded or conniving ways of procuring an award.”⁶⁸ Bad faith is required.⁶⁹ An intentional malfeasance would be another fair description.⁷⁰ Where evidence was admitted during an arbitration of a party’s arrest record, despite a state statute barring such evidence, such conduct did not qualify as undue means.⁷¹

The second requirement is that there must be a nexus between the improper conduct and the arbitrator’s award.⁷² The basis of the nexus requirement is that the statute provides for vacatur only where the award is *procured* by improper means.⁷³ As such, the courts have read this language to require a nexus between the improper conduct and the award.⁷⁴ The nexus, however, does not require that the aggrieved party establish that the award would have been different had the improper conduct not occurred.⁷⁵ But, there must be some nexus between the improper conduct and the award. Where an arbitrator premised his

62. Hood v. Laskaris, No. 84-1293, 1985 WL 188257, at *3, 126 Wis. 2d 510, 375 N.W.2d 219 (Ct. App. Aug. 8, 1985) (per curiam, unpublished table decision) (citing Doghera v. Safeway Stores, Inc., 679 F.2d 1293, 1297 (9th Cir. 1982)).

63. Hood, 1985 WL 188257, at *3.

64. Pegues, 2009 WL 454672, ¶ 15.

65. A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403 (9th Cir. 1992).

66. Id.

67. Nat’l Cas. Co. v. First State Ins. Grp., 430 F.3d 492, 499 (1st Cir. 2005).

68. Id.

69. Shearson Hayden Stone, Inc. v. Liang, 493 F. Supp. 104, 108 (N.D. Ill. 1980), *aff’d*, 653 F.2d 310 (7th Cir. 1981).

70. Id.

71. Am. Postal Workers Union v. U.S. Postal Serv., 52 F.3d 359, 361–62 (D.C. Cir. 1995).

72. Pegues v. Progressive N. Ins. Co., No. 2008AP1500, 2009 WL 454672, ¶ 15, 2009 WI App 41, 316 Wis. 2d 774, 766 N.W.2d 242 (Feb. 25, 2009) (per curiam, unpublished table decision).

73. Forsythe Int’l, S.A. v. Gibbs Oil Co. of Tex., 915 F.2d 1017, 1022 (5th Cir. 1990).

74. Id.

75. Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988).

award on grounds clearly independent of issues related to the fraud, there was no nexus between the fraud and the award.⁷⁶ Similarly, where an expert witness perjured himself as to his credentials but the witness's testimony concerned only relatively minor issues in the arbitration, the fraud was not sufficient to vacate the arbitrator's award.⁷⁷

Finally, the aggrieved party must prove that the improper conduct was not discoverable prior to the award.⁷⁸ Where a party moved to vacate an arbitration award on the basis of fraud but during the arbitration stated that he suspected that the opposing party had falsified documents, the court concluded that the fraud was discoverable by due diligence prior to the issuance of the award and thereby vitiated the basis of his motion.⁷⁹ Similarly, where evidence was improperly destroyed prior to the arbitration and the aggrieved party was aware of the improper destruction, the aggrieved party was unable to use that improper conduct as a ground for vacatur because it was well known to all parties involved prior to the arbitration.⁸⁰

V. EVIDENT PARTIALITY

An arbitration award will be vacated where there is evidence of evident partiality or corruption on the part of the arbitrator.⁸¹ The policy behind vacating an arbitration award where the arbitrator has been evidently partial is to protect "fundamental fairness."⁸² The parties to the process must believe that a disinterested arbitrator will make the award.⁸³

76. *Id.*

77. *Peabody v. Rotan Mosle, Inc.*, 677 F. Supp. 1135, 1137–38 (M.D. Fla. 1987).

78. *Id.* at 1138; *Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104, 109 (N.D. Ill. 1980), *aff'd*, 653 F.2d 310 (7th Cir. 1981).

79. *Lafarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1339 (9th Cir. 1986).

80. *Pegues v. Progressive N. Ins. Co.*, No. 2008AP1500, 2009 WL 454672, ¶ 16, 2009 WI App 41, 316 Wis. 2d 774, 766 N.W.2d 242 (Feb. 25, 2009) (per curiam, unpublished table decision).

81. 9 U.S.C. § 10(a)(2)(2012); WIS. STAT. § 788.10(1)(b) (2013–2014).

82. *Diversified Mgmt. Servs., Inc. v. Slotten*, 119 Wis. 2d 441, 446, 351 N.W.2d 176, 179 (Ct. App. 1984) (quoting *Catz Am. Co. v. Pearl Grange Fruit Exch., Inc.*, 292 F. Supp. 549, 552 (S.D.N.Y. 1968)) (internal quotation mark omitted), *quoted in* *Tri-Cnty. Invs., LLC v. Toney Law Offices, S.C.*, No. 2007AP195, 2008 WL 426233, ¶ 24, 2008 WI App 51, 309 Wis. 2d 234, 747 N.W.2d 527 (Feb. 19, 2008) (per curiam, unpublished table decision).

83. *Richco Structures v. Parkside Vill., Inc.*, 82 Wis. 2d 547, 557, 263 N.W.2d 204, 210 (1978).

Whether an arbitrator has exhibited evident partiality is a question of law to be determined de novo by the court.⁸⁴ The required burden of proof standard is by clear and convincing evidence.⁸⁵

The definition of evident partiality is not simply proof that an arbitrator has an interest in the outcome of the proceeding or “proof that a relationship exists between the arbitrator and a party or a party’s representative which is so substantial that the arbitrator’s . . . [partiality] may be inferred.”⁸⁶ The definition is more nuanced.

“‘[E]vident partiality’ exists . . . when a reasonable person knowing the previously undisclosed information would have . . . doubts regarding the impartiality of the arbitrator”⁸⁷ One court has noted that the doubt must be a serious doubt about the arbitrator’s partiality.⁸⁸ “[T]he standard is not simply that a reasonable person, upon learning of the undisclosed information, would have investigated further.”⁸⁹ Rather, the standard is whether a reasonable person, after further investigation, would have concluded that partiality is likely.⁹⁰ One court has best captured the meaning by noting that the phrase “evident partiality” should be “broadly construed to mean ‘evidence of possible partiality,’ rather than narrowly construed to mean ‘partiality is self evident.’”⁹¹

A neutral arbitrator “must disclose at the outset” of the arbitration any relationship or transaction that the arbitrator “has had with the parties or with the representatives of the parties to the arbitration proceeding.”⁹² Also, “the neutral arbitrator must disclose any facts which might indicate to a reasonable person that the arbitrator . . . might . . . have an interest in the outcome of the arbitration.”⁹³ Finally, the neutral arbitrator must disclose any fact or information, which might reasonably support “the appearance of the existence of any bias,

84. *DeBaker v. Shah*, 194 Wis. 2d 104, 112, 533 N.W.2d 464, 466 (1995).

85. *Id.* at 117.

86. *Richco Structures*, 82 Wis. 2d at 557–58.

87. *DeBaker*, 194 Wis. 2d at 116–17 (emphasis omitted) (internal quotation mark omitted).

88. *Borst v. Allstate Ins. Co.*, 2006 WI 70, ¶ 3, 291 Wis. 2d 361, 717 N.W.2d 42.

89. *DeBaker*, 194 Wis. 2d at 116–17.

90. *Id.*

91. *Sch. Dist. of Spooner v. Nw. United Educators*, 136 Wis. 2d 263, 271, 401 N.W.2d 578, 582 (1987).

92. *Richco Structures v. Parkside Vill., Inc.*, 82 Wis. 2d 547, 558, 263 N.W.2d 204, 211 (1978).

93. *Id.*

prejudice, partiality, or the absence of impartiality.”⁹⁴ The arbitrator’s failure to disclose any of these facts or relationships is proof of evident partiality.⁹⁵ Even matters that are in the public record must be disclosed.⁹⁶

Full disclosure, however, is not a declaration of impartiality.⁹⁷ Rather, the purpose of full disclosure is to minimize and hopefully eliminate litigation whereby the court is asked to determine whether the relationship or information is insignificant and inconsequential, or whether it is substantial.⁹⁸ It is much better to get these issues resolved on the front end rather than the back end of the arbitration. Wisconsin clearly adopts a preference for pre-arbitration challenges.⁹⁹ Once full disclosures are made, “a party may seek the removal of a challenged arbitrator under the general equity powers of the . . . court.”¹⁰⁰ The court, thereby, may order the selection of another arbitrator “if the court determines the challenged arbitrator demonstrates ‘evident partiality.’”¹⁰¹

Finally, it is preferable to let the parties “gauge the arbitrator’s . . . predilection” for partiality, rather than the courts.¹⁰² A party’s “failure to . . . object based on the information disclosed prior to the arbitration” will likely “act as a forfeiture of any subsequent post-arbitration challenge [based] on the disclosed information.”¹⁰³

VI. ARBITRATOR MISCONDUCT

An arbitration award will be vacated if the arbitrator is guilty of misconduct in conducting the hearing, including refusing to postpone the hearing without good cause, refusing to hear pertinent and material evidence, or any other behavior that may have prejudiced a party’s rights.¹⁰⁴ Stated more succinctly, arbitrator misconduct occurs when an arbitrator fails to exercise reasonable discretion when conducting the

94. *Id.*

95. *Id.* at 559.

96. *DeBaker v. Shah*, 194 Wis. 2d 104, 119, 533 N.W.2d 464, 469 (1995).

97. *Borst v. Allstate Ins. Co.*, 2006 WI 70, ¶ 3, 291 Wis. 2d 361, 717 N.W.2d 42.

98. *Richco Structures*, 82 Wis. 2d at 560.

99. *Borst*, 2006 WI 70, ¶ 35.

100. *Id.*

101. *Id.*

102. *Richco Structures*, 82 Wis. 2d at 560–61.

103. *Borst*, 2006 WI 70, ¶ 36.

104. 9 U.S.C. § 10(a)(3) (2012); WIS. STAT. 788.10(1)(c) (2013–2014).

arbitration. Allegations of arbitrator misconduct take many forms. For example, allegations of arbitrator misconduct have included the failure to record the hearing,¹⁰⁵ the failure to grant an adjournment,¹⁰⁶ the failure to produce a reasoned award,¹⁰⁷ the refusal to admit evidence,¹⁰⁸ ex parte contact by the arbitrator,¹⁰⁹ the lack of legal analysis in an award,¹¹⁰ the refusal to view a construction site,¹¹¹ the refusal to stay a hearing, and the failure to swear in a witness.¹¹² Every allegation of arbitrator misconduct must be brought before the arbitrator, or it will be deemed waived by the courts.¹¹³

Mistakes of judgment of either facts or law are generally not grounds for vacating an award.¹¹⁴ The complaining party must investigate the misconduct and present some evidence to support the claim.¹¹⁵ In order to establish arbitrator misconduct, it is necessary to have a record of the arbitration proceeding.¹¹⁶ As a general rule, however, if there is no requirement in the contract, the arbitrator is not required to record the hearing.¹¹⁷ In the event there is no hearing transcript, the court will presume the presence of every fact necessary to support the arbitrator's

105. *Hayett v. Kemper Sec., Inc.*, No. 96-2424, 1997 WL 768921, at *2, 216 Wis. 2d 113, 573 N.W.2d 899 (Ct. App. Dec. 16, 1997) (unpublished table decision).

106. *Tri-Cnty. Invs., LLC v. Toney Law Offices, S.C.*, No. 2007AP195, 2008 WL 426233, ¶ 9, 2008 WI App 51, 309 Wis. 2d 234, 747 N.W.2d 527 (Feb. 19, 2008) (per curiam, unpublished table decision).

107. *Navarro v. Lake Grp., Inc.*, No. 91-1142, 1992 WL 70490, at *1, 167 Wis. 2d 487, 482 N.W.2d 669 (Ct. App. Feb. 19, 1992) (per curiam, unpublished table decision).

108. *Lake States, Inc. v. Walia*, No. 99-1033, 2000 WL 1114485, ¶ 7, 2000 WI App 214, 238 Wis. 2d 841, 618 N.W.2d 273 (Aug. 1, 2000) (per curiam, unpublished table decision).

109. *Navarro*, 1992 WL 70490, at *1.

110. *Breen v. Winkel*, No. 95-2677, 1996 WL 252962, at *4, 202 Wis. 2d 651, 551 N.W.2d 64 (Ct. App. May 14, 1996) (unpublished table decision).

111. *Richco Structures v. Parkside Vill., Inc.*, No. 82-1069, 1983 WL 161650, at *1, 113 Wis. 2d 722, 334 N.W.2d 588 (Ct. App. Apr. 22, 1983) (per curiam, unpublished table decision).

112. *Mattson v. Schultz*, No. 95-2837, 1996 WL 208192, at *1, 201 Wis. 2d 817, 549 N.W.2d 287 (Ct. App. Apr. 30, 1996) (per curiam, unpublished table decision).

113. *Fett v. Luksetich*, No. 96-0839, 1997 WL 199942, at *4, 210 Wis. 2d 497, 568 N.W.2d 321 (Ct. App. Apr. 24, 1997) (unpublished table decision).

114. *Richco Structures*, 1983 WL 161650, at *2.

115. *Navarro v. Lake Grp., Inc.*, No. 91-1142, 1992 WL 70490, at *3, 167 Wis. 2d 487, 482 N.W.2d 669 (Ct. App. Feb. 19, 1992) (per curiam, unpublished table decision).

116. *Carey v. Ablan*, No. 03-1930, 2004 WL 252010, ¶ 6, 2004 WI App 68, 271 Wis. 2d 820, 677 N.W.2d 733 (Feb. 12, 2004) (per curiam, unpublished table decision).

117. *Navarro*, 1992 WL 70490, at *1.

decision.¹¹⁸ An affidavit cannot be used as a substitute for a transcript.¹¹⁹ Where an arbitration was conducted under the rules of the National Association of Securities Dealers (NASD), which required the arbitrator to record all hearings, the failure of the arbitrator to record a hearing was held not to be misconduct.¹²⁰ Similarly, where an arbitrator indicated to the parties that he would get a court reporter for the hearing but failed to do so, such conduct did not amount to misconduct.¹²¹

The form of the arbitrator's award has also led to allegations of misconduct. Specifically, it has been alleged that the lack of legal analysis in an award is a basis to vacate the award.¹²² The courts, however, have rejected such an argument.¹²³ In fact, the arbitrator is not required to produce a reasoned award unless a statute or the parties' contract requires one.¹²⁴

Arbitrators should generally be very cautious about excluding or limiting evidence. However, an arbitrator did not commit misconduct when the arbitrator denied the admission of evidence because the party paid its administrative fees late and the party "failed to timely submit . . . [the] documents . . . [the party] intended to use at the hearing."¹²⁵ Also, an arbitrator's refusal to view an allegedly defective construction site was not misconduct where the request was made after the close of the hearing.¹²⁶

Requests for stays and adjournments are common and difficult issues in arbitration. This decision always involves balancing competing

118. *Grutzner, S.C. v. Church*, No. 94-3128-FT, 1995 WL 109129, at *1, 192 Wis. 2d 767, 532 N.W.2d 471 (Ct. App. Mar. 16, 1995) (per curiam, unpublished table decision).

119. *Id.*

120. *Hayett v. Kemper Sec., Inc.*, No. 96-2424, 1997 WL 768921, at *2, 216 Wis. 2d 113, 573 N.W.2d 899 (Ct. App. Dec. 16, 1997) (unpublished table decision).

121. *Tri-Cnty. Invs., LLC v. Toney Law Offices, S.C.*, No. 2007AP195, 2008 WL 426233, ¶ 27, 2008 WI App 51, 309 Wis. 2d 234, 747 N.W.2d 527 (Feb. 19, 2008) (per curiam, unpublished table decision).

122. *Breen v. Winkel*, No. 95-2677, 1996 WL 252962, at *4, 202 Wis. 2d 651, 551 N.W.2d 64 (Ct. App. May 14, 1996) (unpublished table decision).

123. *Id.*

124. *Navarro v. Lake Grp., Inc.*, No. 91-1142, 1992 WL 70490, at *1, 167 Wis. 2d 487, 482 N.W.2d 669 (Ct. App. Feb. 19, 1992) (per curiam, unpublished table decision).

125. *Lake States, Inc. v. Walia*, No. 99-1033, 2000 WL 1114485, ¶¶ 7-8, 2000 WI App 214, 238 Wis. 2d 841, 618 N.W.2d 273 (Aug. 1, 2000) (per curiam, unpublished table decision).

126. *Richco Structures v. Parkside Vill., Inc.*, No. 82-1069, 1983 WL 161650, at *2, 113 Wis. 2d 722, 334 N.W.2d 588 (Ct. App. Apr. 22, 1983) (per curiam, unpublished table decision).

interests. Where a court ruled that an arbitrator did not commit misconduct by failing to grant an adjournment, the court identified various factors that must be considered by the arbitrator, including any “previous request for . . . [adjournment], how long the . . . [arbitration] ha[s] been pending, . . . the reasons for the requested continuance,” and whether any of the parties will be prejudiced.¹²⁷ In a similar situation, no misconduct was found when an arbitrator refused to stay a hearing in order to await the outcome of an underlying lawsuit or to allow a witness from out of state to return and testify.¹²⁸ Essentially, the court will support the arbitrator’s decision provided the arbitrator exercises reasonable discretion.¹²⁹

Although generally prohibited, even *ex parte* contact between the arbitrator and a party has been held not to be misconduct.¹³⁰ Finally, the failure of an arbitrator to swear in a witness has been held not to be a sufficient basis to vacate an award.¹³¹

VII. ARBITRATOR MISUSE OF POWER

An arbitration award will be vacated when the arbitrator exceeds his powers or so imperfectly executes his powers that a mutual, final, and definite award has not been made.¹³² When an arbitrator misuses his powers, the courts characterize the arbitrator’s conduct as exceeding his authority.¹³³ There are three different ways that an arbitrator can misuse his powers or exceed his authority. First, the arbitrator can construe the parties’ agreement in such a perverse way that he commits a perverse misconstruction.¹³⁴ Second, the arbitrator misuses his

127. *Tri-Cnty. Invs., LLC v. Toney Law Offices, S.C.*, No. 2007AP195, 2008 WL 426233, ¶ 22, 2008 WI App 51, 309 Wis. 2d 234, 747 N.W.2d 527 (Feb. 19, 2008) (per curiam, unpublished table decision) (quoting Brief of Defendant-Appellant Toney Law Offices, S.C. at 25, *Tri-Cnty. Invs., LLC v. Toney Law Offices, S.C.*, No. 2007AP195 (Feb. 19, 2008), 2007 WL 7259693).

128. *Boardman, Suhr, Curry & Field, LLP v. Bosben*, No. 2011AP1862, 2013 WL 627247, ¶ 11, 2013 WI App 41, 346 Wis. 2d 730, 828 N.W.2d 592 (Feb. 21, 2013) (per curiam, unpublished table decision).

129. *Id.*

130. *Navarro v. Lake Grp., Inc.*, No. 91-1142, 1992 WL 70490, at *3, 167 Wis. 2d 487, 482 N.W.2d 669 (Ct. App. Feb. 19, 1992) (per curiam, unpublished table decision).

131. *Mattson v. Schultz*, No. 95-2837, 1996 WL 208192, at *2, 201 Wis. 2d 817, 549 N.W.2d 287 (Ct. App. Apr. 30, 1996) (per curiam, unpublished table decision).

132. 9 U.S.C. § 10(a)(4) (2012); WIS. STAT. § 788.10(1)(d) (2013–2014).

133. *Racine Cnty. v. Int’l Ass’n of Machinists & Aerospace Workers Dist. 10*, 2008 WI 70, ¶ 11, 310 Wis. 2d 508, 751 N.W.2d 312.

134. *Id.*

authority when he manifestly disregards the law in arriving at his award.¹³⁵ And third, if the arbitrator's award violates public policy, the arbitrator has misused his power.¹³⁶ Any allegation of misuse of power must be raised before the arbitrator or the issue will be waived.¹³⁷ It is a question of law whether an arbitrator has misused his power.¹³⁸

The public policy limitation on the authority of an arbitrator is not enumerated in the statute.¹³⁹ Nevertheless, courts have concluded that an arbitrator's award must be consistent with public policy in order to be sustained.¹⁴⁰ Those courts that have supported the public policy limitation have done so on the basis that the arbitrator's award must satisfy the standards set by statute and also those developed at common law.¹⁴¹

A. Perverse Misconstruction

An arbitrator commits a "perverse misconstruction" of a contract when the arbitrator's interpretation is so implausible that it is totally and absolutely not supported by the contract language or contract construction principles, and devoid of any foundation in reason.¹⁴² When the court is reviewing an arbitrator's award, the court is not to decide which construction of the contract is the more reasonable one.¹⁴³ Rather, the arbitrator's award must "be upheld if there is some reasonable foundation" for the award.¹⁴⁴ If the court does not find a

135. *Id.*

136. *Id.*; Milwaukee Dist. Council 48 v. Milwaukee Cnty., No. 2011 WI App 14, ¶ 8, 331 Wis. 2d 188, 795 N.W.2d 777.

137. Fett v. Luksetich, No. 96-0839, 1997 WL 199942, at *4, 210 Wis. 2d 497, 568 N.W.2d 321 (Ct. App. Apr. 24, 1997) (unpublished table decision).

138. Wausaukee Sch. Dist. v. Wausaukee Educ. Ass'n, No. 2011AP1716, 2012 WL 1623504, ¶ 15, 342 Wis. 2d 251, 816 N.W.2d 351 (Ct. App. May 10, 2012) (unpublished table decision); Milwaukee Police Supervisors' Org. v. City of Milwaukee, 2012 WI App 59, ¶ 20, 341 Wis. 2d 361, 815 N.W.2d 391.

139. See WIS. STAT. § 788.10(d) (2013–2014).

140. Racine Cnty., 2008 WI 70, ¶ 11.

141. Fett, 1997 WL 199942, at *3; Emp'rs Ins. of Wausau v. Certain Underwriters at Lloyd's London, 202 Wis. 2d 673, 689, 552 N.W.2d 420, 426 (Ct. App. 1996).

142. Wausaukee Sch. Dist., 2012 WL 1623504, ¶ 24; City of Antigo v. Antigo City Emps.' Union Local 1192, No. 89-0296, 1989 WL 112305, at *2, 151 Wis. 2d 786, 447 N.W.2d 395 (Ct. App. July 25, 1989) (unpublished table decision).

143. Baldwin–Woodville Area Sch. Dist. v. W. Cent. Educ. Ass'n—Baldwin Woodville Unit, 2009 WI 51, ¶ 22, 317 Wis. 2d 691, 766 N.W.2d 591.

144. Milwaukee Police Supervisors' Org. v. City of Milwaukee, 2012 WI App 59, ¶ 20, 341 Wis. 2d 361, 815 N.W.2d 391 (quoting *Baldwin–Woodville*, 2009 WI 51, ¶ 22) (internal quotation mark omitted).

reasonable foundation, then the courts conclude that the arbitrator has exceeded his authority.¹⁴⁵ The rationale used by the courts when they vacate an arbitrator's award on the basis of a perverse misconstruction is that the court is protecting the parties' contract.¹⁴⁶

It is proper for an arbitrator to interpret the parties' contract but not to modify it.¹⁴⁷ An arbitrator is "without authority to . . . modify plain and unambiguous" terms of the parties' contract.¹⁴⁸ Unfortunately, there is no bright-line test for distinguishing between interpreting a contract and modifying it.¹⁴⁹ Interpreting an ambiguous contract or term is within an arbitrator's authority.¹⁵⁰ An arbitrator interprets a contract when there is ambiguity in the contract. The test used by the courts to evaluate the arbitrator's decision that the parties' contract was ambiguous is whether the language in question could rationally be viewed as ambiguous.¹⁵¹ Once it is determined that the contract language is ambiguous, the arbitrator is free to choose between the reasonable alternative constructions of the language and thereby does not commit a perverse misconstruction.¹⁵² The court will uphold the arbitrator's decision as long as the court finds support for the arbitrator's award in the contract, notwithstanding that the court might have reached a different result.¹⁵³ Where the parties' contract provided for the award of "consequential damages," the arbitrator's decision on

145. *Baldwin-Woodville*, 2009 WI 51, ¶ 23; *Milwaukee Police Supervisors' Org.*, 2012 WI App 59, ¶ 20.

146. *Baldwin-Woodville*, 2009 WI 51, ¶ 39 (Prosser, J., dissenting).

147. *Wis. Law Enforcement Ass'n, Local 1 v. State Dep't of Transp.*, 2010 WI App 27, ¶ 18, 323 Wis. 2d 444, 780 N.W.2d 170.

148. *Fluor Bros. Constr. Co. v. City of De Pere*, No. 84-466, 1984 WL 180247, at *1, 121 Wis. 2d 698, 359 N.W.2d 181 (Ct. App. Oct. 9, 1984) (unpublished table decision).

149. *City of Antigo v. Antigo City Emps.' Union Local 1192*, No. 89-0296, 1989 WL 112305, at *3, 151 Wis. 2d 786, 447 N.W.2d 395 (Ct. App. July 25, 1989) (unpublished table decision).

150. *Id.*

151. *Local 236 Laborers Int'l Union of N. Am. v. City of Madison*, No. 01-1506, 2002 WL 576397, ¶ 25, 2002 WI App 134, 255 Wis. 2d 832, 646 N.W.2d 854 (Apr. 18, 2002) (unpublished table decision); *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, No. 94-1256, 1995 WL 128497, at *3, 192 Wis. 2d 763, 532 N.W.2d 469 (Ct. App. Mar. 28, 1995) (per curiam, unpublished table decision).

152. *Fluor Bros. Constr. Co.*, 1984 WL 180247, at *2.

153. *Milwaukee Dist. Council 48 v. City of Milwaukee*, No. 99-2069, 2000 WL 705353, ¶ 8, 200 WI App 161, 238 Wis. 2d 94, 617 N.W.2d 677 (June 1, 2000) (unpublished table decision); *Oshkosh Paraprofessional Educ. Ass'n v. Oshkosh Area Sch. Dist.*, No. 95-0133, 1995 WL 702403, at *3, 198 Wis. 2d 388, 542 N.W.2d 238 (Ct. App. Nov. 22, 1995) (per curiam, unpublished table decision).

what damages naturally and directly flowed from the breach were beyond the court's review.¹⁵⁴ Where an arbitrator found the language "full duties and responsibilities" to be ambiguous and thereby interpreted the phrase, the court upheld the arbitrator's interpretation as one that had a foundation in reason.¹⁵⁵ Also, where a contract was silent on whether "arbitration" meant the arbitrator should conduct a de novo hearing or a certiorari-type hearing, the arbitrator's decision that the language intended a de novo hearing was upheld.¹⁵⁶ Finally, where a contract provided that a party was entitled to "basic due process," the arbitrator's interpretation of such phrase was within the arbitrator's purview and "not a perverse misconstruction of the contract."¹⁵⁷

A common tool used by arbitrators when interpreting ambiguous contract language is to analyze the parties' past practices. This technique is consistent with contract analysis, which provides that the parties' prior course of dealing¹⁵⁸ or course of performance¹⁵⁹ or both are part of their current contract.¹⁶⁰ The prior course of dealing and course of performance are the parties' past practices. These past practices must be unequivocal, readily ascertainable, and clearly established between the parties.¹⁶¹

Where a contract is ambiguous or silent on an issue, an "arbitrator does not alter or modify [the] contract by drawing upon the past

154. *Ackerman v. Mason Bldg. Sys., Inc.*, No. 92-2608, 1993 WL 404316, at *2-3, 179 Wis. 2d 850, 514 N.W.2d 723 (Ct. App. Oct. 12, 1993) (per curiam, unpublished table decision).

155. *Local 236 Laborers Int'l Union of N. Am.*, 2002 WL 576397, ¶¶ 13-15.

156. *Fortney v. Sch. Dist. of W. Salem*, No. 80-1447, 1981 WL 139207, at *5, 104 Wis. 2d 737, 313 N.W.2d 278 (Ct. App. Aug. 26, 1981) (unpublished table decision).

157. *Racine Unified Sch. Dist. v. Serv. Emps.' Int'l Union, Local 152*, 158 Wis. 2d 51, 58, 462 N.W.2d 214, 216 (Ct. App. 1990).

158. RESTATEMENT (SECOND) OF CONTRACTS § 223(1) (1979) ("A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."); *see also* WIS. STAT. §§ 401.205(1), .303(2) (2013-2014).

159. A course of performance is a sequence of conduct concerning the current contract between the parties that can be useful in interpreting the parties' contract. *See* WIS. STAT. § 401.303(1).

160. *See id.* § 401.201(2)(b); RESTATEMENT (SECOND) OF CONTRACTS § 4 cmt. a (1979).

161. *Cf. City of Antigo v. Antigo City Emps.' Union Local 1192*, No. 89-0296, 1989 WL 112305, at *3, 151 Wis. 2d 786, 447 N.W.2d 395 (Ct. App. July 25, 1989) (unpublished table decision).

practice[s]” between the parties to resolve the dispute.¹⁶² However, it is critical that the arbitrator determines and finds in his award that the past practice has continued under the current contract.¹⁶³ The failure of the arbitrator to make such a finding will cause the court to vacate the arbitrator’s award because it “does not draw its essence” from the contract.¹⁶⁴ For example, in *City of Madison v. AFSCME*,¹⁶⁵ the city ordered several city employees not to report for duty on a holiday.¹⁶⁶ The union objected to the city’s order on the basis that the parties had a past practice that permitted employees to request not to work on a holiday.¹⁶⁷ When the matter was submitted to arbitration, the arbitrator found that this practice was well established and the city had made no effort to seek to change it during contract negotiations.¹⁶⁸ Therefore, the past practice had become part of the parties’ contractual relationship even though the matter was not expressly in the contract. Proof of a past practice necessarily avoids a claim of perverse misconstruction.

Two of the more common issues facing an arbitrator that are challenged as a perverse misconstruction are the award of attorney’s fees and punitive damages. Wisconsin follows the American rule when it comes to the award of attorney’s fees to a successful party.¹⁶⁹ The American rule provides that attorney’s fees must be authorized by the parties’ contract or by a statute.¹⁷⁰ Further, if the authorization is to come from a statute, the statutory authority must be express, not implied.¹⁷¹ Where an arbitrator awarded attorney’s fees to a successful party and neither the contract nor any statute expressly provided for

162. *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, No. 94-1256, 1995 WL 128497, at *3, 192 Wis. 2d 763, 532 N.W.2d 469 (Ct. App. Mar. 28, 1995) (per curiam, unpublished table decision) (citing *City of Madison v. AFSCME*, 124 Wis. 2d 298, 303, 369 N.W.2d 759, 762 (Ct. App. 1985)); *Wis. Law Enforcement Ass’n, Local 1 v. State Dep’t of Transp.*, 2010 WI App 27, ¶ 19, 323 Wis. 2d 444, 780 N.W.2d 170.

163. *Milwaukee Dist. Council 48 v. City of Milwaukee*, No. 83-704, 1984 WL 180625, at *1, 118 Wis. 2d 824, 349 N.W.2d 110 (Ct. App. Mar. 23, 1984) (per curiam, unpublished table decision).

164. *Id.* at *2.

165. 124 Wis. 2d 298, 369 N.W.2d 759 (Ct. App. 1985).

166. *Id.* at 300.

167. *Id.*

168. *Id.*

169. *Milwaukee Teacher’s Educ. Ass’n v. Milwaukee Bd. of Sch. Dirs.*, 147 Wis. 2d 791, 796–97, 433 N.W.2d 669, 671 (Ct. App. 1988).

170. *Id.*

171. *Id.*

such authority, the arbitrator exceeded his authority.¹⁷² On the other hand, where the parties' contract provided that the arbitration was to be conducted under the rules of the American Arbitration Association (AAA), whose rules permitted the award of attorney's fees if authorized by law, and a state statute authorized attorney's fees for the issue in arbitration, the arbitrator's award of fees was upheld.¹⁷³ The court further noted that, even though the statute provided that a "court" could award attorney's fees, the arbitrator's award of attorney's fees was upheld.¹⁷⁴ Further, the same rule applies for the award of attorney's fees when seeking to confirm an arbitrator's award with the circuit court or on appeal from a circuit court decision.¹⁷⁵ The parties' contract or a statute must authorize the award of such attorney's fees under those specific circumstances.¹⁷⁶

It is an open question in Wisconsin whether an arbitrator can award punitive damages. There are three views taken by courts regarding whether an arbitrator can award punitive damages. The first view, supported by the federal courts under the FAA, is that arbitrators are empowered to award punitive damages unless the arbitration agreement states to the contrary.¹⁷⁷ The rationale underlying this view is that the ability to award punitive damages is needed to provide the arbitrator with the ability to award complete relief as mandated by the facts.¹⁷⁸ In other words, if the facts are such that a court could award punitive damages, then an arbitrator should have the same ability.¹⁷⁹ The second view is that the award of punitive damages is solely a function of the court, and arbitrators do not have the power to award punitive damages, even if the parties' agreement would allow them.¹⁸⁰ The rationale supporting the second view is that "arbitration arises out of a contractual relationship," and parties are unable by contract to benefit

172. *Id.* at 797–98.

173. *Winkelman v. Kraft Foods, Inc.*, 2005 WI App 25, ¶ 17, 279 Wis. 2d 335, 693 N.W.2d 756.

174. *Id.*

175. *Id.* ¶ 45.

176. *Id.* ¶ 17.

177. *Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 12 (1st Cir. 1989); *see also* *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 64 (1995).

178. *Raytheon Co.*, 882 F.2d at 12.

179. *Id.*

180. *U.S. Fidelity & Guaranty Co. v. DeFluiter*, 456 N.E.2d 429, 432 (Ind. Ct. App. 1983).

from or be penalized by the award of punitive damages.¹⁸¹ The third view provides that punitive damages may be awarded by an arbitrator but only when there is an express provision authorizing such relief in the arbitration agreement.¹⁸² The rationale supporting this view is that punitive damages are relatively rare in contract disputes and, as such, such a drastic remedy should not be implied without express authorization in the contract.¹⁸³

The leading case in Wisconsin on the ability of an arbitrator to award punitive damages is *Winkelman v. Kraft Foods, Inc.*¹⁸⁴ Winkelman was a farmer who was awarded punitive damages by an arbitrator as a result of fraudulent statements made by an agent of Kraft Foods.¹⁸⁵ When Winkelman submitted the arbitrator's award to the circuit court for confirmation, the circuit court affirmed the arbitrator's award of compensatory damages but denied the punitive damage award.¹⁸⁶ Winkelman appealed the circuit court's denial of the punitive damage award.¹⁸⁷ The appeals court acknowledged the three approaches taken by various jurisdictions on this issue.¹⁸⁸ However, the court declined to choose between the three views.¹⁸⁹ Rather, the court concluded that it was the arbitrator's decision to choose which view of the parties' contract the arbitrator would accept, and having done so by selecting the first view, the court would not vacate the arbitrator's award of punitive damages.¹⁹⁰ Therefore, in the absence of a statutory or judicial declaration on the matter, an arbitrator is free to choose between the three views when deciding whether to award punitive damages.

The first view does appear to be the better reasoned one. Where a factual circumstance is such that an award of punitive damages is justified, it should not matter whether the tribunal is a court or arbitration. If such were the case, a party could use arbitration as a means to escape full responsibility for his fraudulent or underhanded

181. *Id.*

182. *Complete Interiors, Inc. v. Behan*, 558 So. 2d 48, 51 (Fla. Dist. Ct. App. 1990).

183. *Id.*

184. 2005 WI App 25, 279 Wis. 2d 335, 693 N.W.2d 756.

185. *Id.* ¶¶ 5–6.

186. *Id.* ¶ 6.

187. *Id.* ¶ 1.

188. *Id.* ¶ 24.

189. *Id.* ¶ 25.

190. *Id.*

conduct. The second view suggests that the parties are unable to contract for the provision of punitive damages. In the absence of some recognized defense to contract formation, such as unconscionability, duress, or the like, there seems to be no legal or logical basis for denying parties the right to enter into any contract they choose, including one that provides for the potential of punitive damages. Finally, the third view suggests that because punitive damages are rare in a contract dispute, punitive damages need to be expressly authorized. However, simply because something only rarely happens does not mean, nor should it mean, that when it does happen, a court or tribunal is not able to address fully the matter. Otherwise, arbitration is not a full and fair substitute for litigation.

B. Manifest Disregard of the Law

A court may not overturn an arbitration award simply because an arbitrator makes an error of law.¹⁹¹ Rather, the arbitrator's award must show "a manifest disregard of the law."¹⁹² There are two ways that an arbitrator's award can be vacated on the ground that it is in manifest disregard of the law. First, an arbitrator commits a manifest disregard for the law when the arbitrator makes "no attempt to apply or [even] interpret the relevant . . . law."¹⁹³ Second, an award will be vacated on the basis that it is in manifest disregard for the law when the award "conflict[s] with [the] governing law, as set forth in the constitution, a statute, or case law."¹⁹⁴

An illustration of an arbitrator committing a manifest disregard of the law is *Orlowski v. State Farm Mutual Automobile Insurance Co.*¹⁹⁵ In *Orlowski*, an insured submitted a claim under her uninsured motorist

191. *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2011 WI App 14, ¶ 8, 331 Wis. 2d 188, 795 N.W.2d 777.

192. *Id.* (quoting *City of Madison v. Madison Prof'l Police Officers Ass'n*, 144 Wis. 2d 576, 586, 425 N.W.2d 8, 11 (1988)).

193. *Racine Cnty. v. Int'l Ass'n of Machinists & Aerospace Workers Dist. 10*, 2008 WI 70, ¶ 33, 310 Wis. 2d 508, 751 N.W.2d 312; *Milwaukee Dist. Council 48*, 2011 WI App 14, ¶ 8; *Breen v. Winkel*, No. 95-2677, 1996 WL 252962, at *3, 202 Wis. 2d 651, 551 N.W.2d 64 (Ct. App. May 14, 1996) (unpublished table decision); *Lukowski v. Dankert*, 178 Wis. 2d 110, 115, 503 N.W.2d 15, 17 (Ct. App. 1993); *City of Madison v. Local 311*, 133 Wis. 2d 186, 191, 394 N.W.2d 766, 769 (Ct. App. 1986).

194. *Racine Cnty.*, 2008 WI 70, ¶ 34; see *Baldwin-Woodville Area Sch. Dist. v. W. Cent. Educ. Ass'n—Baldwin Woodville Unit*, 2009 WI 51, ¶ 24, 317 Wis. 2d 691, 766 N.W.2d 591; *Sharp v. Universal Underwriters Ins. Co.*, No. 81-1648, 1982 WL 172066, at *2, 107 Wis. 2d 747, 322 N.W.2d 700 (Ct. App. May 17, 1982) (per curiam, unpublished table decision).

195. 2012 WI 21, 339 Wis. 2d 1, 810 N.W.2d 775.

coverage after exhausting the policy limits against an underinsured motorist.¹⁹⁶ The claim was submitted to an arbitration panel, and the panel “precluded Orlowski from recovering . . . the value of medical expenses that were written off by her medical provider.”¹⁹⁷ The basis of the arbitrators’ ruling was that the collateral source rule did not apply to uninsured motorist cases.¹⁹⁸ The collateral source rule “provides that ‘a plaintiff’s recovery cannot be reduced by payments or benefits from other sources.’”¹⁹⁹ The policies underlying the collateral source rule are that the tortfeasor should pay the full cost of his wrongful conduct, the aggrieved party should be fully compensated, and the insured should receive the full benefit of the premiums paid.²⁰⁰ The court concluded that the arbitrators manifestly disregarded the law by not applying the collateral source rule to Orlowski’s recovery.²⁰¹

By comparison, in *Pegues v. Progressive Northern Insurance Co.*,²⁰² an insured was involved in an accident and claimed that another vehicle hit his car from behind and pushed his vehicle into the accident.²⁰³ The insured’s claim that a third vehicle was involved in the accident caused the insurance company to seek to preserve the insured’s vehicle for a subsequent inspection to determine if the insured’s vehicle was damaged in the rear.²⁰⁴ Unfortunately, the insurance company erroneously released the insured’s vehicle from custody before any inspection, and it was subsequently repaired.²⁰⁵ The arbitration panel subsequently ruled against the insured on his claim that his vehicle was damaged from the rear.²⁰⁶ On appeal to the circuit court, the insured argued that the arbitration panel committed a manifest disregard of the law because it failed to apply the presumption of spoilage law that any damaged or destroyed evidence would have yielded evidence detrimental to the one

196. *Id.* ¶ 2.

197. *Id.*

198. *Id.* ¶ 3.

199. *Id.* ¶ 18 (quoting *Koffman v. Leichtfuss*, 2001 WI 111, ¶ 29, 246 Wis. 2d 31, 620 N.W.2d 201).

200. *Id.*

201. *Id.* ¶ 40.

202. *Pegues v. Progressive N. Ins. Co.*, No. 2008AP1500, 2009 WL 454672, 2009 WI App 41, 316 Wis. 2d 774, 766 N.W.2d 242 (Feb. 25, 2009) (per curiam, unpublished table decision).

203. *Id.* ¶ 2.

204. *Id.* ¶ 4.

205. *Id.*

206. *Id.* ¶ 5.

who damaged or destroyed the evidence (the insurance company).²⁰⁷ The court, however, noted that the presumption arising from spoilage only occurs when the evidence is deliberately or intentionally destroyed or damaged.²⁰⁸ The court upheld the panel's decision because the evidence was destroyed as a result of the insurance company's negligence, not any egregious conduct.²⁰⁹ Therefore, there was no manifest disregard of the law by the panel.

Occasionally, an arbitrator will be faced with conflicting legal precedent. Where there are conflicting positions or unsettled law, the arbitrator does not commit a manifest disregard of the law by choosing to follow one of the contrary positions.²¹⁰ There is no manifest disregard of the law where "substantial authority sustains the arbitrator's assumption as to the law."²¹¹ This is true whether the court agrees with the arbitrator's assumption or not.²¹² Where the courts were split on whether Wisconsin Statutes section 100.18 could be applied to a commercial contract dispute (as opposed to a consumer dispute), the arbitrator was free to choose either position without committing a manifest disregard of the law.²¹³ Similarly, where an arbitrator awarded emotional distress damages for a non-traumatic economic injury, the award was upheld against a claim that the damage award was a manifest disregard of the law because the courts were split on the issue.²¹⁴

Sometimes, there is simply no established law for the arbitrator to evaluate. In *Lukowski v. Dankert*,²¹⁵ the injured party was involved in a traffic accident and was thrown from the vehicle.²¹⁶ The aggrieved party was not wearing a seatbelt at the time of the injury.²¹⁷ The matter was

207. *Id.* ¶ 9.

208. *Id.* ¶ 10.

209. *Id.* ¶ 12.

210. *Winkelman v. Kraft Foods, Inc.*, 2005 WI App 25, ¶¶ 12–13, 279 Wis. 2d 335, 693 N.W.2d 756.

211. *City of Madison v. Local 311*, 133 Wis. 2d 186, 191, 394 N.W.2d 766, 769 (Ct. App. 1986); *see Grambow v. Associated Dental Servs., Inc.*, No. 94-1735, 1996 WL 5638, at *4, 199 Wis. 2d 522, 546 N.W.2d 578 (Ct. App. Jan. 9, 1996) (per curiam, unpublished table decision).

212. *Local 311*, 133 Wis. 2d at 191.

213. *Id.*

214. *Breen v. Winkel*, No. 95-2677, 1996 WL 252962, at *3, 202 Wis. 2d 651, 551 N.W.2d 64 (Ct. App. May 14, 1996) (unpublished table decision).

215. 184 Wis. 2d 142, 515 N.W.2d 883 (1994).

216. *Id.* at 146.

217. *Id.*

referred to an arbitration panel for resolution.²¹⁸ No expert testimony was provided with regard to the injured party's comparative negligence as a result of not wearing a seatbelt.²¹⁹ Nevertheless, the panel by a vote of 2–1 allocated forty percent negligence to the injured party because she was not wearing a seatbelt at the time of the accident.²²⁰ The dissenting arbitrator argued that expert testimony was required before any comparative negligence could be allocated to the injured party.²²¹ Therefore, in the absence of such testimony, no comparative negligence should have been allocated to the injured party. Upon submission of the panel's decision to the court for confirmation, the trial court agreed with the dissenting arbitrator and concluded that the panel's award was a manifest disregard of the law.²²² The generally accepted law in Wisconsin is that expert testimony is required to allocate comparative negligence for the failure to wear a seat belt.²²³ However, all the cases that have applied the general rule were cases where the injured person was injured inside the vehicle.²²⁴ On appeal, the appeals court noted that the arbitration panel did discuss the generally accepted rule that requires expert testimony to allocate comparative negligence for failure to wear a seat belt.²²⁵ But the appeals court concluded that those cases were not applicable because the injured party in this matter was ejected from the vehicle.²²⁶ The appeals court did not find that the arbitration panel committed any manifest disregard of the law.²²⁷ Rather, the appeals court concluded that the panel distinguished the current case from the existing case law and, thereby, was free to fill in the gap in the existing law.²²⁸ The Wisconsin Supreme Court affirmed because the panel considered the relevant law and the distinction made by the panel was not precluded by any case law or statute.²²⁹ Similarly, where there were no generally accepted accounting principles applicable to valuing certain financial assets, the arbitrators did not commit a manifest

218. *Id.* at 147.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 148.

223. *Id.*

224. *Id.* at 149.

225. *Id.* at 154.

226. *Id.*

227. *Id.* at 148.

228. *Id.* at 154.

229. *Id.*

disregard of the law where they “were guided by their professional experience and the . . . underlying principles” to the contract in rendering an award.²³⁰

C. Against Public Policy

An award that violates a strong public policy will be vacated,²³¹ if the public policy is clearly defined.²³²

The public policy exception to the general rule of judicial deference [is] . . . narrowly construed and limited to situations where the public policy “is well defined and dominant [Public policy] is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.”²³³

In other words, public policy is not to be found in the mind of the beholder.

There are a number of cases that illustrate when public policy is clearly defined. In *Sands v. Menard, Inc.*,²³⁴ Menard, Inc. had hired Ms. Sands as their general counsel.²³⁵ Thereafter, Menard terminated Sands, and Sands sued Menard for wrongful termination.²³⁶ The parties agreed to submit the matter to arbitration.²³⁷ At the conclusion of the arbitration hearing, “the panel ordered that Sands be reinstated” to her general counsel position.²³⁸ Menard refused reinstatement, and Ms. Sands sought to compel compliance by confirming the arbitration award with the circuit court.²³⁹ Conversely, Menard sought to vacate the award on the basis that the award was against public policy because the

230. *Grambow v. Associated Dental Servs., Inc.*, No. 94-1735, 1996 WL 5638, at *3, 199 Wis. 2d 522, 546 N.W.2d 578 (Ct. App. Jan. 9, 1996) (per curiam, unpublished table decision).

231. *Sands v. Menard, Inc.*, 2010 WI 96, ¶¶ 2, 50, 328 Wis. 2d 647, 787 N.W.2d 384; *Fortney v. Sch. Dist. of W. Salem*, No. 80-1447, 1981 WL 139207, at *5, 104 Wis. 2d 737, 313 N.W.2d 278 (Ct. App. Aug. 26, 1981) (unpublished table decision).

232. *Breen v. Winkel*, No. 95-2677, 1996 WL 252962, at *2, 202 Wis. 2d 651, 551 N.W.2d 64 (Ct. App. May 14, 1996) (unpublished table decision).

233. *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2011 WI App 14, ¶ 14, 331 Wis. 2d 188, 795 N.W.2d 777 (quoting *Sands*, 2010 WI 96, ¶ 50).

234. 2010 WI 96.

235. *Id.* ¶ 4.

236. *Id.* ¶ 1.

237. *Id.* ¶ 20.

238. *Id.* ¶ 26.

239. *Id.* ¶ 29.

attorney–client relationship was irretrievably broken.²⁴⁰ The circuit court “confirmed the arbitration award in its entirety.”²⁴¹ On further appeal, however, the Wisconsin Supreme Court vacated the arbitration award.²⁴² The court noted that a public policy violation must be clear, and the particular public policy must be well-defined and dominant.²⁴³ The court found that “an attorney’s ethical obligations, particularly the attorney’s duty of loyalty . . . under . . . the Rules of Professional Conduct, embody the strong public policy of the State of Wisconsin.”²⁴⁴ As such, the court concluded that the arbitration award violated public policy because it “order[ed] the reinstatement of an attorney where [the] reinstatement would clearly lead to a violation of the attorney’s ethical obligations.”²⁴⁵ In the court’s opinion, the arbitrators’ award would “force[] an attorney to represent a client” where there has been a “complete disintegration of mutual goodwill, trust, and loyalty” between the parties.²⁴⁶

Another illustration of clearly defined public policy is *Kadlec v. Kadlec*.²⁴⁷ In *Kadlec*, a father and son were business partners “in a number of business ventures.”²⁴⁸ One of the businesses was “a community based residential facility in Iowa.”²⁴⁹ Subsequently, the parties decided to dissolve their business relationships.²⁵⁰ As part of the dissolution process, the parties agreed to submit any matters that they could not amicably resolve to arbitration.²⁵¹ As part of the dissolution process, the father “signed an exclusive listing contract with a Wisconsin real estate broker . . . to sell” the community-based residential facility in Iowa.²⁵² Thereafter, the property was sold in Iowa, and the father paid his one-half of the real estate commission to the Wisconsin relator, but the son refused to pay.²⁵³ In order to force the son to pay his one-half of

240. *Id.*

241. *Id.*

242. *Id.* ¶ 70.

243. *Id.* ¶ 50.

244. *Id.* ¶ 49.

245. *Id.*

246. *Id.* ¶ 52.

247. 2004 WI App 84, 272 Wis. 2d 373, 679 N.W.2d 914.

248. *Id.* at ¶ 2.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at ¶ 4.

the real estate commission, the father sought an order from an arbitrator ordering the son to pay.²⁵⁴ The arbitrator issued an award ordering the son to pay his share of the commission, and the circuit court affirmed the order.²⁵⁵ The court of appeals, however, vacated the arbitrator's award.²⁵⁶ The court noted that both Wisconsin and Iowa have specific statutes requiring a realtor to have a license in its state before a commission can be paid for real estate services in that state.²⁵⁷ More particularly, those statutes require that a real estate broker prove he is licensed in the particular state where the services are rendered.²⁵⁸ The public policy underlying the licensing requirements is to establish competency in each state as each state defines it.²⁵⁹ The arbitrator's award essentially required the son to pay a real estate commission to a Wisconsin realtor for the sale of property in Iowa.²⁶⁰ As such, the arbitrator's award violated the strong public policy emanating from each state's licensing laws, therefore requiring that the arbitrator's award be vacated.²⁶¹

Conversely, where the public policy is not clearly defined, the courts will defer to the arbitrator's judgment and not vacate the arbitrator's award on a supposed public policy basis. In *City of Madison v. AFSCME*,²⁶² the city ordered several city employees not to report for duty on a holiday.²⁶³ The union objected to the city's order on the basis that the parties had a past practice that permitted employees to decide if they wished to work on a holiday.²⁶⁴ When the matter was submitted to arbitration, the arbitrator ruled that the past practice between the parties was part of their contractual arrangement and the city had violated the parties' agreement.²⁶⁵ The city petitioned the circuit court to vacate the award on the ground that it violated the public policy that

254. *Id.*

255. *Id.*

256. *Id.* at ¶ 14.

257. *Id.* ¶ 9; *see also* WIS. STAT. § 452.20 (2013–2014); IOWA CODE ANN. § 543B.30 (West 2011).

258. *Kadlec*, 2004 WI App 84, ¶ 9; *see also* WIS. STAT. § 452.20; IOWA CODE ANN. § 543B.30.

259. *Kadlec*, 2004 WI App 84, ¶ 12.

260. *Id.* ¶ 13.

261. *Id.* ¶ 14.

262. 124 Wis. 2d 298, 369 N.W.2d 759 (Ct. App. 1985).

263. *Id.* at 300.

264. *Id.*

265. *Id.*

a city has complete control of its fiscal policies.²⁶⁶ The circuit court vacated the arbitrator's award on the basis of that public policy.²⁶⁷ The appeals court, however, reversed the circuit court and reinstated the arbitrator's award.²⁶⁸ The appeals court noted that "[c]ourts should proceed cautiously when making public policy determinations."²⁶⁹ As such, the court reasoned that, "in the absence of evidence as to the exigency of the city's financial condition," it was reluctant to overturn the arbitrator's award on the basis of public policy.²⁷⁰

The courts will give the arbitrator significant latitude in specifying a particular remedy, provided the arbitrator acknowledges the public policy applicable to the situation. The courts note that an arbitrator is free to be innovative in directing a particular remedy, provided the remedy is consistent with the parties' agreement and public policy.²⁷¹ Even where the arbitrator's awards are significantly different on essentially the same factual pattern, the courts have upheld the awards provided the arbitrators acknowledged the public policy involved in the circumstance. For example, in *Cedarburg Education Association v. Cedarburg Board of Education*,²⁷² a public school teacher had viewed "adult images" on the school's computer system in violation of the school's computer policy.²⁷³ As a result, the school district terminated the teacher's employment.²⁷⁴ The union objected to the termination on the basis that the discharge was not for just cause.²⁷⁵ The parties agreed to submit the matter to binding arbitration.²⁷⁶ The arbitrator concluded that the single violation by the teacher did not warrant termination and ordered the teacher's reinstatement.²⁷⁷ The school board refused to

266. *Id.* at 300–01.

267. *Id.* at 301.

268. *Id.* at 306.

269. *Id.* at 305 (quoting *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 573, 335 N.W.2d 834, 840 (1983)) (internal quotation marks omitted).

270. *Id.* at 305–06.

271. *Stoughton Trailers, Inc. v. Wis. Emp't Relations Comm'n*, No. 84-1681, 1985 Wisc. App. LEXIS 3799, at *9, 127 Wis. 2d 561, 378 N.W.2d 296 (Oct. 10, 1985) (unpublished table decision).

272. No. 2007AP852, 2008 WL 2812714, 2008 WI App 135, 313 Wis. 2d 831, 756 N.W.2d 809 (Wis. Ct. App. July 23, 2008) (unpublished table decision).

273. *Id.* ¶ 3.

274. *Id.* ¶ 1.

275. *Id.*

276. *Id.* ¶ 2.

277. *Id.* ¶¶ 3–4.

reinstate the teacher, and the union filed a complaint in circuit court to enforce the arbitration award.²⁷⁸ The circuit court vacated the arbitrator's award on the basis that the teacher's immoral conduct was an automatic ground for termination.²⁷⁹ On appeal, the appeals court agreed that a court may vacate an arbitrator's award when it violates a strong public policy.²⁸⁰ Further, the appeals court acknowledged that Wisconsin has a statutory definition of immoral conduct for the protection of students, which is evidence of a strong public policy.²⁸¹ Therefore, the appeals court vacated the arbitrator's award on the basis that it violated the strong public policy against immoral conduct in schools and affirmed the circuit court's order terminating the teacher's employment.²⁸²

Conversely, in *Middleton Education Association v. Middleton–Cross Plains Area School District*,²⁸³ a number of teachers were disciplined for “viewing and sharing on school computers emails containing sexually explicit pictures and inappropriate jokes.”²⁸⁴ The school district terminated one of the teachers and the union challenged the discharge in arbitration.²⁸⁵ The arbitrator reduced the employee's termination to a suspension.²⁸⁶ Thereafter, the union applied to the court for confirmation of the award, and the school district moved to vacate it.²⁸⁷ The circuit court confirmed the arbitrator's award.²⁸⁸ On appeal, the court presumed “a strong public policy against teachers viewing sexually explicit materials in school or on school-issued computers.”²⁸⁹ The school district argued that “any discipline short of termination . . . fails to give sufficient weight to the presumed public policy.”²⁹⁰ The court of

278. *Id.* ¶ 4.

279. *Id.*

280. *Id.* ¶ 10.

281. *Id.* ¶ 14; see WIS. STAT. § 115.31(1)(c) (2013–2014) (“‘Immoral conduct’ means conduct or behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare or education of any pupil.”).

282. *Cedarburg*, 2008 WL 2812714, ¶ 21.

283. No. 2012AP2395, 2013 WL 4556288, 2013 WI App 115, 350 Wis. 2d 5057, 838 N.W.2d 137 (Aug. 29, 2013) (per curiam, unpublished table decision).

284. *Id.* ¶ 1.

285. *Id.* ¶¶ 2–3.

286. *Id.* ¶ 3.

287. *Id.*

288. *Id.*

289. *Id.* ¶ 8.

290. *Id.* ¶ 10.

appeals, however, disagreed with the school district.²⁹¹ The court noted that the school district's argument was not supported by any published case law, nor would it be fair to terminate only one employee without also terminating others "who also viewed sexually explicit material in school or on school computers."²⁹² In other words, there may be a number of remedies available to an arbitrator as long as the arbitrator honors the strong public policy.

Finally, even though an employee's conduct clearly violates public policy and justifies termination, the employee may be reinstated if the employer also breached the contract. In *Racine Unified School District v. Service Employees' International Union, Local 152*,²⁹³ an employee of the school district smoked marijuana with a student.²⁹⁴ Upon learning of the incident, the school suspended the employee and initiated a disciplinary hearing.²⁹⁵ Upon the conclusion of the disciplinary hearing, the employee was terminated.²⁹⁶ The hearing officer at the disciplinary hearing conducted all aspects of the hearing, including "interview[ing] [the] witnesses, decid[ing] what charges to bring, issu[ing] the charges, determin[ing] which witnesses were to be called at the hearing, presid[ing] at the hearing, and ma[king] the decision to terminate" the employee.²⁹⁷ The union objected to the lack of due process exhibited in the disciplinary hearing and sought arbitration of the matter.²⁹⁸ "The arbitrator found that the employee did smoke marijuana with the student and that . . . [his conduct was] just cause . . . for termination."²⁹⁹ The arbitrator, however, further found that because the employee was denied basic due process rights the employee's penalty was reduced from termination to a one-year suspension without pay.³⁰⁰ "The district moved to vacate the arbitration award"³⁰¹ The circuit court vacated the award on the basis that it violated the strong public policy of

291. *Id.*

292. *Id.*

293. 158 Wis. 2d 51, 462 N.W.2d 214 (Ct. App. 1990).

294. *Id.* at 54.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 54-56.

299. *Id.* at 56.

300. *Id.* at 57.

301. *Id.*

“protecting students from drug use in the schools.”³⁰² On appeal, however, the court reversed the circuit court’s decision and reinstated the arbitrator’s award.³⁰³ The court reasoned that the arbitrator’s order reinstating the employee after a one-year suspension without pay was justified in order to remedy the school district’s breach of its obligation to provide basic due process rights during the disciplinary process.³⁰⁴

VIII. CONCLUSION

Once an arbitration award has been issued, the prevailing party normally seeks to have the award confirmed by a court. At the same time, the disappointed party has the right to move the court to vacate the award. There are five grounds recognized by the courts for vacating an arbitrator’s award.

First, the moving party can raise substantive arbitrability. There are two different types of substantive arbitrability. One is to prove that the parties never entered into a contract to arbitrate their dispute or that the contract they did enter into is avoidable for any of the usual contract defenses. Two, the disappointed party can challenge the scope of the arbitration clause upon which the other party maintains that their dispute must be arbitrated.

The second ground is to establish that the prevailing party used some corruption, fraud, or undue means to corrupt the arbitration process. In addition to proving the improper conduct by the other party, it must also be established that there is a nexus between the improper conduct and the award and that the improper conduct was not discoverable prior to the award.

Third, an award will be vacated where it can be shown that the arbitrator was evidently partial. The third ground primarily focuses on what is required to be disclosed by the arbitrator prior to being approved as the arbitrator. It is much preferred to have issues of impartiality resolved by the parties before the arbitration, rather than by a court after the arbitration. In addition, if a disclosure is made prior to the arbitration, it can no longer be used as a basis for vacatur after the arbitration.

Fourth, arbitrator misconduct in conducting the arbitration is a ground for vacatur. There are a multitude of issues that arise here,

302. *Id.*

303. *Id.* at 62–63.

304. *Id.*

including the arbitrator's failure to record the hearing, denying adjournment requests, failing to admit evidence, failing to provide a reasoned award, and others. These are difficult issues where the arbitrator must balance competing interests, and the failure to exercise appropriate discretion will result in a vacatur.

Finally, the last ground is where the arbitrator has exceeded his authority by misusing his power. There are three ways that an arbitrator exceeds his authority. First, the arbitrator can commit a perverse misconstruction of the parties' contract. In other words, an arbitrator can interpret the parties' contract, but he cannot amend, modify, or add to it. Although there are many issues that arise under the "perverse misconstruction" argument, two of the most common ones are the ability of an arbitrator to award attorney's fees and punitive damages. Second, an arbitrator exceeds his authority when he manifestly disregards the law. This occurs when the arbitrator's award either ignores the law or conflicts with prevailing law. An arbitrator, however, is free to choose between conflicting precedents or fill in the gap if there is no precedent. Finally, the arbitrator cannot issue an award that is against public policy. The public policy, however, must be clearly defined by the constitution, a statute, or case law.